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Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor

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"Genocide" is a word with enormous emotive meaning and rhetorical potential, which is clear from Dr. Leiser's article.[1] It seems to me that the term "genocide" is used in scholarly and political discourse in two quite distinct ways: (a) as a label of everyday speech to describe in the most condemnatory of tones the mass destruction—deliberate or accidental—of a nation, race, people, or culture; (b) as a legal term of art to ascribe criminal liability to persons who (with an appropriate degree of blameworthiness) engage in the kind of destruction indicated in (a). The former shall be referred to as "everyday genocide" and the latter "criminal genocide." "Criminal genocide" is a much narrower concept than "everyday genocide." It carries with it not only connotations of censure but also a belief that there is a degree of individual guilt that makes the application of the criminal sanction to particular individuals appropriate. "Everyday genocide" probably covers all of Dr. Leiser's cases. Criminal genocide certainly does not. If I understand him correctly, Dr. Leiser has considerable contempt for international law because of its failure to cover all of his cases.

In what follows, I plan to do three things. The first is to introduce you to the topic of the Indonesian invasion of East Timor in late 1975, an action which resulted in tens, if not hundreds, of thousands of deaths and untold suffering. Timor's plight has largely been ignored in the United States press, and may be added as another example to Dr. Leiser's catalog.[2] The Indonesian actions in Timor have been characterized in some quarters as genocide.[3] Second, I would like to offer some thoughts about criminal guilt as it applies to genocide in its criminal sense. Does the Model Penal Code have anything to offer by way of illumination? Finally, I want to explore whether criminal genocide should be expanded in scope. Does the Genocide Convention go far enough?

I. *Indonesia and East Timor*[4]

East Timor was in early 1974 a Portuguese colonial backwater, com-

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1. Leiser, *Victims of Genocide*, 8 OHIO NORTH. L. REV. 293 (1981).

2. *See* 1 N. CHOMSKY & E. HERMAN, THE POLITICAL ECONOMY OF HUMAN RIGHTS 129-204 (1979).

3. *See* A. KOHEN & J. TAYLOR, AN ACT OF GENOCIDE: INDONESIA'S INVASION OF EAST TIMOR (1979). A Conference at Yale University on February 27, 1981 was devoted to *Genocide in East Timor: Political and Ethnographic Views*. Neither Kohen & Taylor nor any of the speakers of the Yale Conference offered an explicit analysis of what they mean by genocide.

4. The historical account in the text is based on the thorough and objective August

prising about half of an island to the north of Australia. Geographically, the island of Timor forms part of the Indonesian archipelago. East Timor had been colonized by the Portuguese in the 1500's. The Portuguese had succeeded in withstanding Dutch pressures as the latter proceeded to control what became the Netherlands East Indies. The Dutch did succeed in colonizing the western part of the island of Timor. Western Timor became part of the Indonesian republic that in 1949 succeeded to Dutch rule in the Indies. During a period of confrontation with the Dutch until the early 1960's, over control of the territory of West Irian, the Indonesians repeatedly denied any territorial claims to Portuguese Timor. They insisted that their boundaries were coterminous with those of the former Netherlands East Indies.

Following the fall of the Caetano regime in Portugal in April 1974, Portugal conceded the right of its colonies to self-determination including independence, but was not organized enough on the ground to proceed systematically with East Timor's decolonization. In the resulting power vacuum, various political parties were formed in East Timor and one of them, UDT, which at that point favored unity with Indonesia, attempted to seize power by coup in August of 1975. It lost out in the ensuing struggle to the independence faction known as FRETILIN. On 7 December 1975 (another "day of infamy"?) Indonesian forces described by the Indonesians as "volunteers" invaded East Timor. By 1978-79 the Indonesian forces had cleared out most of the FRETILIN remnants, although some guerilla activity apparently continues.[5] Timor became a province of Indonesia.

Columnist Jack Anderson, in his syndicated column dated 8 November 1979,[6] estimated that about half of the 1975 population, which he gave as 600,000, had been "wiped out by warfare, disease, and starvation."[7] Most observers would put the number at a little less than this, but there is no doubt that the Indonesians triggered a human tragedy of massive dimensions. The International Committee of the Red Cross, which had been actively involved in humanitarian work in the aftermath of the August 1975 civil war, was forced to leave the country at the time of the Indonesian invasion. The Indonesians did not have the will or the logistical resources to alleviate suffering in the territory and, until 1979, denied entry to international aid organizations which did have the capacity to respond to the situation. The International Committee of the Red Cross was permitted to return in October 1979 and then only on a limited basis. The medical coordinator of relief efforts in East Timor of the International Committee of the Red Cross stated in February of 1980, upon

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1976 publication by the United Nations Department of Political Affairs, Trusteeship and Decolonization entitled *Decolonization, Issue on East Timor. See also* J. JOLLIFFE, EAST TIMOR: NATIONALISM & COLONIALISM (1978).

5. Kamm, *The Silent Suffering of East Timor*, N.Y. TIMES, Feb. 15, 1981, §6 (Magazine), at 34.

6. WASHINGTON POST, Nov. 8, 1979, at 11, col. 4 (D.C. Edition).

7. *Id.* at 11, col. 6 (D.C. Edition).

completion of an assessment mission to the territory, that the situation was among the worst he had ever seen.[8] Since then the harshest features of widespread malnutrition appear to have been overcome, but there is still an enormous amount to be done to alleviate the residual effects of the invasion.[9]

Large numbers of deaths resulted directly from Indonesia's bombing and indiscriminate killing of non-combatants. Thousands more resulted from starvation, due to the fact that much of the population was forced to abandon farming and flee to the mountains to escape the fighting in 1977 and 1978. Moreover, in the past two years, from 200,000 to 300,000 Timorese have been resettled in Indonesian controlled camps where overcrowded, cramped conditions have promoted the spread of disease, in particular malaria, intestinal maladies and lung infections.[10]

If humanitarian needs went unaddressed because of callous indifference, the disregard of civil and political rights appears to have been calculated. In the early days of the occupation, hundreds of civilians were summarily executed in the Timor capital, Dili.[11] Numerous reports evidence the disappearance of East Timorese—often the educated and those with leadership ability. Journalists also report that people who had surrendered under an Indonesian presidential amnesty in 1977 have since disappeared and are believed to have been killed.[12]

Conditions in the prisons containing political prisoners are reported to be seriously substandard. Diseases, including tuberculosis and malnutrition, are alleged to be rampant. Thus far, the ICRC has not been permitted by Indonesian authorities to carry out its normal function of prison visitation in East Timor.

Recently there have been numerous reports of the use of torture by detention authorities. One refugee reported that his brother, falsely accused of being a member of FRETILIN, was held for 16 months and tortured with electricity.[13] It is impossible to determine the full extent of the use of torture within the prisons since independent observers, such as the ICRC, have not been permitted to enter them, and since the information concerning prison conditions has been largely limited to refugee sources and letters smuggled from the prisons.

Critics of the Indonesian actions have argued forcefully that those ac-

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8. ICRC BULL. No. 49 (Feb. 6, 1980).

9. *See* Kamm, note 5 *supra*. *See also* ICRC BULL., No. 63, (Apr. 1, 1981) announcing end of ICRC role with the comment:

> Thanks in great part to the Red Cross efforts, the ghosts of sickness and hunger seemed to belong to a nightmare long forgotten. But it was only yesterday, and there is still much work to be done by authorities, the local Red Cross and the villagers to turn a better situation into a really good one.

10. ICRC BULL. No.44 (Sept. 5, 1979).

11. Kamm, *War-Ravaged Timor Struggles Back From Abyss*, N.Y. TIMES, Jan. 28, 1980, at A1, col. 4.

12. Markham, *Refugees From East Timor Report Famine Situation*, N. Y. TIMES, Jan. 29, 1980, at A2, col. 3.

13. *Id.*

tions constituted a flagrant breach of the United Nations Charter's proscription of the use of force, and a denial of the right of the East Timorese to self-determination.[14] The Indonesians have responded with a hodgepodge of arguments[15]—that they were invited to help by representatives of the majority of the people, that they were exercising self-defense in response to FRETILIN's border incursions, that they were acting to preempt a take over of the territory by left-wing forces which would destabilize the whole Southeast Asian area, and that this was a case of humanitarian intervention. They argue that Indonesia has an "interest" in the matter because of geographic proximity, ethnic similarity, and alleged historical connections in pre-colonial times. None of these arguments, when examined with any care, justifies the use of force or the denial of self-determination. But some of them do muddy the waters in terms of the genocide issue to which this article now turns.

II. *Criminal Genocide*

As a teacher of criminal law, as well as of international law, I am always struck when I review the voluminous literature on genocide by how few of the writers even think about the questions of *mens rea* or blameworthiness involved. Let me recall a little basic criminal law with which most are familiar. Generally, in the Anglo-American system, criminal liability is based on one of four culpability elements which I list in descending degrees of heinousness, using essentially the arrangement of the Model Penal Code:[16]

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14. *See* Franck & Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U.J. INT'L L. & POL. 331 (1976); K. Suter, *International Law and East Timor*, 4 DYASON HOUSE PAPERS No. 2 (1978); Elliott, *The East Timor Dispute*, 27 INT'L & COMP. L.Q. 238 (1978); Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 YALE J. WORLD PUB. ORD. 1 (1981).

15. *See, e.g.*, the paper issued by the Department of Information of the Republic of Indonesia in August 1976 entitled *Process of Decolonization in East Timor.*

16. MODEL PENAL CODE §2.02(2) (Proposed Official Draft, 1962) provides:

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and

Purposely (or intentionally)
Knowingly
Recklessly
Negligently

Sometimes liability is imposed in the absence of these elements of culpability. Such cases are said to be offenses of "strict" or "absolute" liability. For the most part, we do not inflict serious criminal penalties for offenses of strict liability. The most serious penalties are normally retained for offenses involving purpose or knowledge.

What has this to do with genocide? The original coiner of the term "genocide" is said to be Raphael Lemkin who wrote in a 1944 book that "new conceptions require new terms" and that he was using the term "genocide":

> to signify a coordinated plan of different actions aiming at the destruction of essential foundations of life of national groups. . . . The objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of national groups, and the destruction of personal security, liberty, health, dignity, and even lives of the individuals belonging to such groups.[17]

I think by this language, particularly the words "aiming at" and "the objectives of such a plan," he meant to include within his definition of genocide some requirement of purpose, or at least knowledge, before guilt would attach. Certainly that was the intent of the drafters of the Genocide Convention.[18] They defined genocide as follows:

> In the present Convention, genocide means any of the following acts committed *with intent to destroy, in whole or in part*, a national, ethnical, racial or religious group as such:
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> (a) Killing members of the group;
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> (b) Causing serious bodily or mental harm to members of the group;

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degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that would be exercised by a reasonable man in his situation.

17. R. LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944). *See also* Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 150-51 (1947); there the writer speaks, of "the specific criminal intent to destroy entire human groups". The words "specific intent" are highly significant. What is required is not only an intent to kill etc.; there must be a further purpose to destroy the group.

18. *See* Edwards, *Contributions of the Genocide Convention to the Development of International Law*, 8 OHIO NORTH. L. REV. 300 (1981).

> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[19]

If I understand Lemkin and the Genocide Convention correctly, genocide as an international crime is not an offense of strict liability. It does not catch cases where the destruction of the group is done negligently; nor does it encompass cases where the destruction is done "only" recklessly or knowingly.

A hypothetical may make the point. Assume that in some Latin-American country it is decided that a road shall be built through an area occupied by an indigenous Indian group that has had little or no contact with Europeans. The road is required to reach and open up a valuable uranium mine. As a result of building the road and related industrial activities, the ecology of the forest is changed, the Indian food supply shrinks, and most of the Indians die of starvation or diseases brought in by non-Indians against which the Indians have no natural immunity.[20] Genocide? The result is certainly destruction of the group, and Dr. Leiser and many others would probably stop there and call it genocide. "Everyday genocide" it probably is. But what if a court of law had to deal with questions of criminal liability? Suppose that the planners of the road and mine and the Head of State are put on trial in an appropriate forum? Is it enough that the destruction occurred to convict them (strict liability)? Is the case stronger if it can be said that a reasonable person in the defendant's position should have known that destruction would occur (negligence)? What if the defendants knew of the substantial risk of wiping out the Indians but carried on regardless (recklessness)? Finally, is it

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19. Convention on the Prevention and Punishment of the Crime of Genocide [1948] art. II, 78 U.N.T.S. 277 (1951) (emphasis added). Some writers have spoken, especially in the context of colonialism, of a notion of "cultural genocide" which involves destruction of a people's national character without necessarily its physical destruction. *See, e.g.*, Sartre, *On Genocide*, CRIMES OF WAR 534 (1971). I am not at all sure that even intentional activities of such a kind come within the Convention. *See* Horowitz, *A Postscript to Genocide*, 28 CHITTY'S L.J. 90, 92 (1980):

> Genocide means the physical dismemberment and liquidation of people on large scales: an attempt by those who rule to achieve the total elimination of a subject people. Genocide does not mean simply depriving people of their cultural heritage. It does not simply refer to a special segment of the population being deprived of opportunities for education, welfare, or health, however hideous such deprivations might be. One must avoid fantasizing about people who are victimized in ways short of genocide. Broadening the concept so that everyone somehow ends up a victim of genocide only leads to tautological reasoning. Physical genocide is tragically large enough in raw numerical terms, not to require a vision of symbolic genocide. Literary mannerisms that add fuel to an already grotesque fire are counterproductive to practical efforts to limit or reverse genocidal patterns.

20. The example is inspired by the plight of the Ache Indians of Paraguay and similar cases in Brazil. *See* L. HOLLAND, SURVIVAL INTERNATIONAL, INDIANS, MISSIONARIES AND THE PROMISED LAND, PHOTOGRAPHS FROM PARAGUAY 14 (1981).

enough that they were practically certain to kill the Indians (knowledge) or is it necessary that their conscious object was to do so (purpose)? The answer under the Genocide Convention seems to me to be rather clear. The prosecution would have to prove purpose/intent. Nothing else will do. All cases short of intent may be genocide in ordinary usage but fall short of criminal genocide as understood in the Convention.

III. *Genocide and East Timor—Should the Convention be Expanded?*

Accept for the moment that between one-sixth and one-half of the East Timorese population was exterminated as a result of the Indonesian action. Suppose that General Ali Murtopo, who was in charge of the Indonesian Timor operation, is brought to trial on a charge of genocide. Suppose that you are planning his defense. I suspect that you would try to marshall his argument somewhat as follows:

> True, we killed or took actions that resulted in the deaths of more people than we would have wished, but
> 1. We did not go in to destroy—we went in to save the people from the criminal negligence of the Portuguese in abandoning them and from the depradations of FRETILIN.
> 2. The Timorese are our ethnic brothers and sisters separated from us by years of colonialism. We would not want to destroy our brethren.
> 3. We were worried about our security if East Timor was overrun by left-wing elements and our main purpose was to prevent this.

The prosecution would argue something like this:

> Yes, but look what you did. You have to be judged by your actions. Surely the sheer scale of the devastation shows that you knew of the risk, but carried on regardless. It is appropriate to draw the inference from this that your purpose was to destroy the East Timorese people.

"Everyday genocide" certainly, but "criminal genocide"? I suggest that if the test were one of negligence, or even recklessness, the case has been made. I'm not at all certain that intent is there (or at least that it can be proved) or even knowledge. Yet I suspect that many of us would feel that criminal liability should attach in a case like this. It seems eminently reasonable to regard those responsible for such actions as the devastation of Timor as common criminals.[21] Has the time come to revise the Genocide Convention in such a way as to catch reckless or even negligent as well as purposeful genocide? In the comparable case of war crimes,

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21. Under the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal as formulated by the International Law Commission in 1950, reproduced in R. FALK, G. KOLKO & R. LIFTON, CRIMES OF WAR, 106-07 (1971) [hereinafter cited as FALK], those responsible for the Timor invasion are probably guilty of war crimes and crimes against the peace, but there are those who would feel that this is a lot like prosecuting Eichmann simply for murder - it does not capture the full flavor of the crime.

there is authority to the effect that in respect of command responsibility for the crimes of subordinates, negligence will suffice.[22] I have elsewhere suggested that imposing command responsibility for negligence (and *a fortiori* recklessness) represents sound policy on two grounds.[23]

1. To minimize loss of human life, a goal sought to be obtained through both the deterrent and educative effects of punishment.[24]
2. To affirm by means of law the weight that civilized members of the international community place on humanitarian principles.

I would suggest now that the same policies apply to genocide. While one would probably not want to impose criminal liability in the absence of any fault, the Genocide Convention should be expanded to include negligent as well as reckless everyday genocide within its ambit.[25]

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22. *In re* Yamashita, 327 U.S. 1 (1946). *See also* FALK, *supra* note 21, at 108, 112-13.

23. Clark, *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 RUT.-CAM. L. J. 59, 78 (1973). *See* Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habituative Effects*, 1969 WIS. L. REV. 550. On the deterrent effects of punishing for negligence, *see* Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code*, 399 ANNALS 24, 31 (1962).

24. On the use of the law for purposes of affirmation, *see* Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CALIF. L. REV. 54 (1968). The symbolic significance of affirming that genocide is criminal may exceed the significance of actually prosecuting anyone for it.

25. One of the questioners at the symposium made the interesting suggestion that, while the Genocide Convention itself does not cover the whole field of genocide as for example understood by philosophers and anthropologists, customary international law might. Accordingly, while the extradition provisions of the treaty might not apply, a country would be perfectly justified in prosecuting genocide under its national law in a manner broader than the Convention. The difficulty with this argument is that there is nothing in the normal sources of customary law to support it. Genocide, as far as state practice is concerned, had its origin in the reference to "crimes against humanity" in the Nuremberg Charter. The first state or inter-state document to use the actual word is G.A. Res. 96 (I), 1 U.N. GAOR Resolutions (1946), which affirmed that genocide is a crime under international law. (One may of course express some doubts about the "affirmation" of something never precisely proscribed or described before.) Neither the Nuremberg Charter nor Resolution 96 (I) addressed the culpability requirement for criminal liability explicitly, but an intent requirement seems implicit in both. The only relevant subsequent state practice is the Convention itself, with its intent requirement. The legal publicists all seem to state or assume that intent is required. Nothing seems to be left on which to base customary law except the language-use of non-lawyers, rather a shaky foundation.

In preparing this article, I pondered the meaning of the term "humanicide" which was contained along with genocide in the title of the symposium. "Humanicide" is not a term that appears in the standard reference works like Black's Law Dictionary and I know of no treaty or other state practice illuminating its meaning. I take it to refer to the kind of killings that the Cambodians perpetrated on themselves rather than on other ethnic groups, or the horrors of Uganda or the Central African Republic. Even without allowing for the differential effects of several hundred years of Portuguese as opposed to Dutch colonization, the East Timorese are ethnically distinct from the Javanese who constitute the racial majority of Indonesia and have more in common with the Melanesians of Papua New Guinea, so that genocide rather than humanicide appears to be the appropriate frame of reference. The only reference to humanicide that I could find in the scholarly literature is a very obscure book by Pieter N. Drost entitled *The Crime of State, Book I, Humanicide* (1959). Drost seems to use the term to cover both horrors like Cambodia and killings, etc., in furtherance of an agressive war. Most interesting is that at 350 he argues in favor of individual liability based on "culpable negligence."